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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 848

ERNEST GAILLARD, JR., and MIGNONNE NASH GAILLARD,
Petitioners,

VERSUS

FREDDIE MORGAN FIELD, Administratrix of the Estate of Fred Morgan, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on July 21, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma delivered orally on November 30, 1965 (R. pp. 122-124), printed in Appendix B hereto, *infra*, p. v, is unreported. The opinion of the Court of Appeals (R. of Court of Appeals p. 4), printed in Appendix B hereto, *infra*, p. vii is unreported as of date of filing this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1967 (R. of Court of Appeals p. 5). Rehearing was denied on September 18, 1967 (R. of Court of Appeals p. 7). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Does the refusal of the court below to enforce the law of California, which recognizes certificates of interest in oil, gas or mining titles or leases as securities which must be registered before sale and provides penalties for failure to register such securities before sale, violate the Full Faith and Credit Clause of the Constitution of the United States?

Does the public policy of Oklahoma refuse recogntion of the law of California, which recognizes a certificate of interest in an oil, gas or mining title or lease as a security which must be registered before sale in such state, and which provides statutory penalties for failure to so register, when Oklahoma does not recognize such an interest as a security?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is Article IV, Section 1 of the Constitution of the United States of America. The statutory provisions involved are Section 1738 of the Judicial Code and Judiciary, 62 Stat. 947, 28 U.S.C. 1738; Sections 25,003, 25,008, 25,500 and 26,100 of the Corporate Securities Law of the Corporations Code of

California, Deerings California Codes, and Section 2(l) of the Oklahoma Securities Act, Title 71, Oklahoma Statutes 1961, Section 2(l). They are printed in Appendix A hereto attached.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Western District of Oklahoma by the petitioners against Fred Morgan to recover certain amounts paid by them for the purchase of unregistered securities sold in California in violation of the California Corporate Securities Law. Fred Morgan filed a counterclaim to recover unpaid expenses incurred by him in the operation of oil and gas wells and leases in which the petitioners owned undivided interests with Mr. Morgan. While the proceedings were pending in the District Court Mr. Morgan died, and upon motions duly presented to that Court, Freddie Morgan Field, Administratrix of the Estate of Fred Morgan, Deceased, was substituted as a party in place of Mr. Morgan, for all purposes. The District Court found in favor of the respondent and against the petitioners and gave the respondent judgment on her counterclaim. The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court on appeal.

The jurisdiction of the District Court was invoked because of diversity of citizenship, the petitioners being residents of the State of California, and the respondent a citizen of the State of Oklahoma.

The petitioners, Ernest Gaillard, Jr., a surgeon, and his wife, Mignonne Nash Gaillard, were and are residents of La Jolla, California. They first met Fred Morgan at a

social function in the home of a mutual acquaintance in La Jolla, in July, 1959. Morgan was a resident of Oklahoma City, Oklahoma, and was vacationing with his family in California at that time (R. 82-83, 160-162).

From discussions with Fred Morgan at said social function, they learned from Morgan that he was in the business of acquiring interests in oil and gas properties and drilling and developing these properties for oil and gas purposes. Mr. Morgan stated that he occasionally discovered opportunities for investment in such properties in areas of proven and commercially profitable production, where the investor's money would be safe. Fred Morgan further stated that when he discovered such opportunities in the future, he would make available to the petitioners, interests in such oil and gas properties (R. 83, 163).

Fred Morgan was the owner of a one-half working interest in a producing oil and gas lease known as the James lease in Lincoln County, Oklahoma. The lease had been incorporated into a plan of unitization approved by the Oklahoma Corporation Commission and the lease was being produced and operated by Gulf Oil Corporation as Operator under the plan of unitization. An owner of one-fourth of the remaining working interest in said lease desired to sell his interest and Fred Morgan purchased the interest and offered it to the Gaillards. The Gaillards accepted the offer, and purchased the interest in December, 1959. The owner of the remaining one-fourth interest in said lease also decided to sell his interest and through Fred Morgan this interest was also purchased by the Gaillards.

In December, 1961, the petitioners also purchased interests in two other leases in Pottawatomie County, Okla-

homa, known as the "Lingerfelt" and "Tiffin" leases, from Mr. Bob Field, an employee and son-in-law of Fred Morgan. Mr. Morgan acquiesced in the sale, but had no other connection with the transaction (R. 73, 164-165, 181-182, 232, 235-236).

Subsequent to the purchase of the interests in the James lease, in December 1959, and beginning in June, 1960, Fred Morgan presented to the petitioners a series of investments. At the trial of this matter, the respondent stipulated "that Fred Morgan made numerous trips to California from 1959 to 1963, and that on all these occasions Fred Morgan and these plaintiffs discussed the business that is the subject of this litigation, or parts of it. I believe also, that part of the stipulation is that they also, on numerous occasions, on many, many occasions discussed part of these deals over the telephone. That Fred Morgan sent volumes of mail to the plaintiffs and a little correspondence, a small amount, was sent back by plaintiffs to Fred Morgan" (R. 87-88). Such discussions resulted in a series of transactions in which Fred Morgan sold to petitioners certain interests in oil and gas leases owned by Fred Morgan on property in the states of Oklahoma, Texas, Nebraska and Colorado (R. 666-69, 73).

The transactions followed a common procedure in that after presenting the "deals" to the petitioners in California, Fred Morgan, from Oklahoma City, had letter agreements offering to sell interests in said oil and gas leases prepared and mailed to the petitioners in California, where they were executed and returned to Fred Morgan in Oklahoma City (R. 86). In all but one case (where there was an expiring lease and no assignment was given), Mr. Morgan,

within a short time, mailed his assignment of the interest involved to the petitioners in California and proceeded with the drilling of the well or wells as provided for in the letter agreements (R. 238).

The letter agreements (Joint Exhibits 1 through 8, R. 149-157) followed a similar pattern in that they were written to confirm the understanding of Fred Morgan to sell and the petitioners to buy an undivided interest in certain oil and gas leases with a well to be drilled on said lease or leases by Mr. Morgan. Payment was to be based upon either a stated total sum or upon a price per foot drilled. Petitioners were to pay in addition for completing the well or wells if they produced oil and gas.

After drilling the well or wells, Mr. Morgan prepared or caused to be prepared in Oklahoma City invoices for the contracted amount for the interest involved and the drilling of the well prescribed in the agreements and for subsequent costs of completing and operating said wells where capable of producing oil or gas. These invoices were mailed to the petitioners in California where the petitioners wrote checks in payment thereof which were mailed to said Fred Morgan in Oklahoma City, until February 1963, when petitioners refused to make further payments (R. 86, 240).

Fred Morgan did not apply for nor secure a permit from the California Commissioner of Securities for any of the interests in oil and gas leases which he sold to the petitioners (R. 254).

On April 2, 1963 the petitioners learned from the California Commissioner of Corporations that Fred Morgan had failed to obtain a permit for the sale of various securities

purchased by the petitioners, said securities being the interests in oil and gas leases offered by Fred Morgan commencing in June, 1960. The petitioners elected to declare such securities purchased from Fred Morgan, null and void and to rescind the sale of such securities and they tendered such securities and interests to Fred Morgan (R. 18, 991-92).

This suit was filed by the petitioners to recover the sums paid by them for the purchase of all of the above described securities, except interests in the James, Lingerfelt and Tiffin leases, which were not registered in California in violation of that state's Corporate Securities Act, less the sums received by them from such properties, the total sum claimed by petitioners being $181,806.31 and interest (R. 3-26).

The District Court rendered its decision against the petitioners in the following language in applicable part:

> "* * *: There is no question in my mind this is not only the law but it is the right thing in this case. If these people had come in and set the whole deal aside, the James lease, the Lingerfelt lease and the Tiffin lease in Pottawatomie county and put it back in status quo, this Court can't see any justice at all in permitting the parties to take advantage of the Act favorable to them and still retaining the benefits under transactions similar to the ones they seek to rescind. I just can't see any soundness in it under the theory that one who seeks equity must do equity, and therefore, I conclude without any hesistancy that these plaintiffs cannot prevail, notwithstanding the Blue Sky Law of California, and I find that law should not be enforced here because there is no comparable substantive statute law in Oklahoma, and that the California Securi-

ties Blue Sky Law is contrary to public policy in Oklahoma, and therefore this is one of those cases where the rule of comity should not be used or exercised.

"* * * there is one further theory under which relief could and should be denied these plaintiffs, and that is, following the law as set down in Robbins v. Pacific Eastern Corporation, and particularly with reference to the place of the performance of the contract. These wells were to be drilled in Oklahoma. It is true he got his letter agreement out there, signed it and returned it, but all the work to be performed was to be here in Oklahoma, and under that theory we are supposed to give validity to the contract if we can, and not place a construction on it that would make it invalid, and especially under that case this rule of interpretation must be applied by the courts. * * * It is particularly applicable in the present case where the plaintiffs and other stockholders got exactly what they bargained for where no fraud or imposition has been proved and where they are now trying to recoup their loss by a strained and technical construction of the contract which turned out to be a bad bargain. Oklahoma being the place of the performance of the contract the Oklahoma law should be applied under the doctrine of lex loci solitiones" (R. 122-124).

The Court of Appeals below affirmed the District Court holding that in view of the difference accorded by California and Oklahoma to oil and gas transactions, like those of the case at bar, "it does appear that application of California law to void the letter agreements and assignments would violate a deep-rooted tradition of the common weal in Oklahoma" (Appendix B, p. xi).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below recognizes that the Oklahoma Supreme Court has held that for a law of a sister state to fail of enforcement in Oklahoma on the ground that it is contrary to the public policy of the forum, such law must "violate some fundamental principal of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Holder* v. *Holder*, 384 P.2d 663 at page 664 (Okla. 1963). The decision of the court below applies this rule by holding that as Oklahoma's Blue Sky Law excludes interests in oil and gas leases from the definition of a "security" (see 71 O.S. 1961 § 2(1), Appendix A), the enforcement in Oklahoma of the provisions of the California Blue Sky Law, which provisions do regulate oil and gas transactions (see Cal. Corp. Code § 25008, Appendix A), "would violate a deep-rooted tradition of the common weal in Oklahoma" and is, therefore, contrary to the public policy of Oklahoma (Appendix B, p. xi).

Petitioners herein submit that the court below incorrectly applied the above stated rule relative to enforcement of a sister state's law.

Both Oklahoma and California have extensive Blue Sky Laws. The public policy behind these laws, as well as all securities laws, is a recognition that the general public may by personal inspection and comparison determine the quality of the product and the reasonableness of the price of automobiles or appliances but that a worthless security may to all appearances be identical to a sound security. The basic purpose of the securities laws of both California and Oklahoma is to provide truth in securities to protect investors against misrepresentation, manipulation, and

other fraudulent acts and practices in the purchase and sale of securities. Such laws may differ in detail as to the number or types of exemptions or exclusions, or in their definition of a security, but the public policy to regulate the sale and issuance of securities remains the same.

Both states provide this protection to investors by requiring the disclosure of basic facts concerning the security itself, the issuer and his financial background and present status, the use to which the money received will be put and other relevant information by registration of the security before offer or sale. If a seller seeks purchasers of securities in either state, he submits to the regulation of the securities law of such state. It is difficult to perceive how the enforcement of the securities law of California, which defines the sale of an oil and gas interest as a security subject to regulation, where the sale is *actually made* in California, against the seller in Oklahoma, the state of his residence, is against the public good of the forum state. Fred Morgan of his own volition placed himself under the California securities law by the sale of securities in that state. Is it the "deep-rooted tradition of the common weal" of the citizens of Oklahoma to aid its citizens in violating the law of a sister state by providing an inviolate sanctuary to which they may return? This is the effect of the holding of the lower court. It is not the effect which is reached in *Holder, supra,* where the Supreme Court of Oklahoma found that the public policy of a state to permit maintenance by one spouse of a suit against the other to recover damages for personal injuries does not require or authorize the courts of the state to ignore foreign law affecting substantive rights where such law is different from that of the forum which does not permit an action for personal injuries between spouses.

There is a necessity for this Court to resolve the conflict between the Court of Appeals and the Supreme Court of Oklahoma in this matter and to restore uniformity between these two courts.

Further, the question involved assumes importance since not only will other litigants in the securities field be involved, but any litigant involved in interstate transactions or travel will be affected if the law of the two or more states involved are conflicting.

Petitioners have found no cases where there has been a denial of the enforcement of a sister state's Blue Sky Law on the ground that such enforcement would violate the public policy of the forum. In this connection, Mr. Louis Loss has stated:

> "The Courts likewise show no inclination in the Blue Sky field to apply the doctrine that a foreign cause of action will not be enforced if it is 'contrary to the strong public policy of the forum.' Two scholars of the conflict of laws who have recently examined this doctrine say that it has been applied generally in very few cases other than those which can be rationalized on the basis of orthodox choice of law considerations. At any rate, with regulatory statutes of one kind or another in every state but Delaware and Nevada, it is difficult to see any room for the operation of the doctrine in the Blue Sky Field." Loss, *The Conflict of Laws and the Blue Sky Laws,* 71 Harv. L. Rev. 209, 225 (1957).

Forty-eight of the fifty states regulate the sale and/or issuance of securities in varying respects. In this era of rapid transportation and communication, if the state regulatory schemes are to be effective, they must not be denied enforcement in a sister state on the grounds that particular

provisions of the statute are in conflict with the forum's public policy.

2. Prior to 1958, the provisions of the Judicial Code implementing the Full Faith and Credit Clause only provided for such effect to be given records and judicial proceedings, 28 U.S.C.A. § 1738 (Appendix A). However, in 1948, an amendment to Section 1738 provided that public acts were to be given the same effect and that statute, in applicable part, now reads as follows:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in courts in such State, Territory or Possession from which they are taken."

This Court, in *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 437 (1943), pointed out that judgments and statutes of other states for which judicial recognition have been sought were at that time (1943) on a different footing; and stated that Congress has provided that judgments "shall have full faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Petitioners submit that this difference between judgments and statutes of other states was removed by the 1948 amendment to § 1738, *supra*, which gave to public acts the same extra-state effect given to judgments.

This Court has not ruled on the effect of such amendment. Such amendment purports to give the same effect to the public acts of the various states as is now given to final judgments of such states. If such amendment does give this

effect to public acts of sister states it is a matter of major legal significance which should be determined by this Court.

3. If, regardless of the 1948 amendment to Section 1738 (28 U.S.C.A. § 1738, Appendix A), public policy of the forum state is still considered by this Court to be grounds for the denial of the enforcement of the pubic acts of a sister state, the public policy of Oklahoma as found below is not of such force to override the stronger governmental interest of California or the principle of unity set forth in the Full Faith and Credit Clause.

This Court, in *Hughes* v. *Fetter,* 341 U.S. 609 (1951), held unconstitutional a statute of Wisconsin which excluded the Wisconsin courts from entertaining suits brought under the wrongful death acts of other states. Although the opinion in *Hughes* noted that the Court found it unnecessary in deciding the appeal to rely on the 1948 amendment to 28 U.S.C.A. § 1738, *supra,* and recognized that full faith and credit did not automatically compel a forum state to subordinate its own policy to a conflicting public act of another state, it did state, at pp. 611-612:

> "* * * It is for this Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states; on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting

Wisconsin courts to entertain this wrongful death action.

"We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. * * *"

In a footnote to its opinion, the Court stated:

"It may well be that the wrongful death acts of Wisconsin and Illinois contain different provisions in regard to such matters as maximum recovery and disposition of the proceeds of suit. Such differences, however, are generally considered unimportant." At p. 612, ftn. 11.

In view of the above quoted language from *Hughes*, petitioners submit that the case at bar presents several important legal questions which should be decided by this Court. Oklahoma, the forum state herein, has a comprehensive Blue Sky Law, 71 O.S. 1961 § 1, *et seq.*, although as previously noted, its provisions do exclude oil and gas transactions from the definition of a security. As Oklahoma has adopted a statutory scheme for the regulation of securities, it is clear that such state has "no real feeling of antagonism against" security actions in general. It should be decided whether the differences in the type of exemptions and in the definition of a security contained in any particular state's Blue Sky Law are important as allegedly expressing under the circumstances herein, the public policy of a state, or whether such differences are to be considered unimportant in view of the "strong unifying principal embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states."

Further, if one of the "competing public policies involved" must be chosen in deciding which state's law is to control, it must be the policy of the state having the most substantial contacts with or the greatest governmental interest in the activity in question." *Alaska Packers Ass'n* v. *Industrial Accident Com'n*, 294 U.S. 532 (1935).

In the case at bar, the facts establish that respondent's decedent offered, sold and delivered to the petitioners in California certificates of interest in oil and gas leases located in the States of Oklahoma, Nebraska, Colorado and Texas. It is the sale of these certificates of interest, defined by the California Corporation Code, § 25008 (Appendix A), as securities, and required to be registered, which gives rise under the California law to petitioners' causes of action. Thus, the question to regulate such sales within its borders or whether it is Oklahoma's policy to encourage such oil and gas transactions that is to prevail herein. Petitioners believe that as the sale of such securities occurred within the State of California, to citizens of that state, the policy of California should prevail.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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